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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

FORREST FYKES, SR. et al., Plaintiffs and Respondents, v. ARMEN JANIAN, Defendant and Appellant.	B286419 (Los Angeles County Super. Ct. No. BC508343)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth R. Feffer, Judge. Affirmed.

Armen Janian, in pro. per., for Defendant and Appellant.

Anderson & Associates, Michael D. Anderson and Andrei V. Serpik, for Plaintiffs and Respondents.

Defendant and appellant Armen Janian's (Janian's) prosecution of this appeal—from an adverse judgment awarding over $1 million in general, special, and punitive damages against him for legal malpractice and fraud—takes the same cavalier approach that may well have contributed to his liability. Most of Janian's arguments challenge the sufficiency of the evidence at trial, but he does not fairly summarize the evidence that supports the judgment, instead preferring to highlight his own trial testimony and largely ignore the rest—including any discussion of the trial court's statement of evidence and reasons supporting its verdict. That is not how appellate litigation works, and the bulk of his arguments are therefore waived. We accordingly resolve only those contentions that do not attack the sufficiency of the evidence against him, namely, whether the trial court erred in excluding testimony from an unnoticed witness, whether expert testimony was necessary to prove malpractice, and whether Janian owed a duty of care or fiduciary duties to two of the homeowner plaintiffs.

I. BACKGROUND

In 2004, Forrest Fykes, Sr. (Forrest, Sr.) and his wife Valerie Fykes (Valerie) purchased a house in the City of Los Angeles for their son Forrest Fykes, Jr. (Forrest, Jr.) and his wife Melissa Fykes (Melissa) (collectively, the Fykes). To purchase the house, Forrest, Sr. and Valerie took out an adjustable-rate mortgage loan. Although the loan was in Forrest, Sr. and Valerie's name, Forrest, Jr. and Melissa would be responsible for making the monthly loan payments.

Because the house was to be their home, Forrest, Jr. and Melissa improved the property in a number of respects. Among

other things, Forrest, Jr. and Melissa re-landscaped the front and back yards and remodeled the kitchen and bathroom, which included new floors and new appliances. As a result of their improvements, the house "was a whole new different house."

For a time, Forrest, Jr. and Melissa were able to make the monthly mortgage payments without difficulty and without financial assistance from Forrest, Sr. and Valerie. But as the interest rate periodically reset and the amount of their monthly payments increased, they found it harder to make the payments. By 2012, the monthly payment, which initially had been $1,800, had almost doubled to $3,300. Although the evidence at trial indicated Forrest, Jr. and Melissa continued to make each monthly payment on time, with some financial assistance from Forrest, Sr. and Valerie, the Fykes began looking for a way to modify the loan so that Forrest, Jr. and Melissa "could comfortably [continue to] make the payments."

In or around July 2011, Forrest, Sr. and Valerie received an unprompted mail solicitation from a loan modification business called National Help Center Law Group (NHC). Viewing the facts in the light most favorable to the judgment, Janian served as a director and Chief Financial Officer of NHC. Janian also received payments from the business.

When Forrest, Sr. and Valerie went to NHC's offices, they were told NHC would pursue a two-pronged strategy to prevent foreclosure on the house where Forrest, Jr. and Melissa lived. First, NHC would refer them to a lawyer, Alan Frank (Frank),[1]

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[1] At the time, Frank (who in 2011 had changed his name from Sean Alan Rutledge) was not eligible to practice law in California. Frank had tendered his resignation from the California State Bar with charges pending against him for

who was prosecuting a civil action in New York state court against various banks. Once they joined Frank's lawsuit, Frank would file a notice of lis pendens in New York, which would purportedly stop any attempt at foreclosure. Second, using the New York litigation as leverage, NHC would negotiate a modification of the mortgage loan. Forrest, Sr. and Valerie agreed with this proposed strategy and paid a $1,800 retainer to Frank and a $2,000 retainer to NHC.

Less than a year later, Forrest, Sr. and Valerie received notice that their claims in the New York action had been dismissed. The dismissal sent Forrest, Sr. "into a panic." He immediately and repeatedly tried to contact NHC by phone but was unsuccessful. Forrest, Jr. tried to reach NHC via the internet, but "the website [had been] taken down, everything was MIA."

With other avenues to contact NHC unavailable, Forrest, Sr. and Forrest, Jr. went to NHC's offices where they met with Daniel Otani (Otani), who they believed worked for NHC, and Janian. Otani introduced Forrest, Sr. and Forrest, Jr. to Janian and he told them "not to worry," adding he would "handle everything."[2] Janian and Otani advised Forrest, Sr. and Forrest, Jr. to stop making payments on the mortgage loan in order to get into a "better" negotiating position with their lender.

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abusive treatment of his clients, many of whom were financially distressed homeowners seeking loan modifications. No one at NHC told Forrest, Sr. and Valerie that Frank could not practice law in California.

[2] Janian testified, at the trial of the Fykes's malpractice and fraud action against him, that he had "never met the Fykes."

Specifically, Janian and Otani proposed they would "take care of the matter" by filing a lawsuit in California and recording a notice of lis pendens to prevent foreclosure on the house, which would purportedly provide leverage to negotiate a loan modification.

Evidently persuaded by Janian's pitch, Forrest, Sr. and Valerie signed a Janian and Associates retainer agreement, with Janian as their attorney.[3] In order to retain Janian, Forrest, Sr. was required to pay an $11,000 retainer. Because their New York lawsuit had been dismissed, however, Janian gave Forrest, Sr. a $4,000 credit, which left a $7,000 balance that was paid in two installments of $3,500 each. Forrest, Sr. paid the first installment at or around the time he and his son met with Janian and Forrest, Jr. and Melissa made the second payment approximately one month later. Although Forrest, Sr. and Valerie had sufficient resources to pay Janian a retainer, Janian told Forrest, Sr. that he (Janian) would petition the trial court for a waiver of filing fees when filing the lawsuit.

In the weeks thereafter, the Fykes heeded Janian's advice and stopped making payments on the loan. Also pursuant to

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[3] When cross-examined at trial, Forrest, Sr. conceded that the retainer agreement he signed included a disclaimer that represented "Janian and Associates, its associates, agents, or representatives have NOT instructed, recommended, or persuaded [him] to miss or be late on any mortgage/loan payments on [the] subject property in order to qualify for a settlement offer." Forrest, Sr. was adamant that Janian personally advised him contrary to the retainer agreement's disclaimer.

Janian's advice, Forrest, Jr. disregarded default notices received at the home after failing to make loan payments.

In April 2012, after meeting with Forrest, Sr. and his son, Janian filed a lawsuit in Los Angeles Superior Court naming various financial institutions as defendants and Forrest, Sr. and Valerie as plaintiffs. Janian did not record a notice of lis pendens and never advised the Fykes he had not done so.

Shortly thereafter, Janian filed a request to waive court fees required to proceed with the civil suit. Janian told Forrest, Sr. and Valerie that they did not need to appear at a hearing on the request to waive fees because he would appear on their behalf. Janian, however, did not appear at the hearing as promised; the court therefore denied the fee waiver request; and then, with the fees unpaid, the court voided the filed complaint, which ended the lawsuit as soon as it started.

When Forrest, Sr. received notice from the court that the Los Angeles Superior Court complaint had been voided—neither Janian nor anyone at NHC advised him of the order—he tried to contact Janian and NHC repeatedly by phone to no avail. Forrest, Sr. returned to NHC's offices in person and found the doors shut and no receptionist present. Forrest, Sr. then sent a registered letter to the address listed for Janian on the State Bar's website, but he never received a response.

In October 2012, Melissa discovered on the internet that their home had been sold at a foreclosure sale. Neither Janian nor anyone at NHC had advised the Fykes of an impending foreclosure. Forrest, Jr. and Melissa were subsequently evicted from the home just before Thanksgiving.

Following their eviction, Forrest, Jr. and Melissa had to sell many of their possessions and they and their two children moved

in with Forrest, Sr. and Valerie. Valerie became depressed and Forrest, Jr. and Melissa's relationship became strained to the point where they almost considered divorcing. In addition, Melissa suffered a miscarriage and then lost another baby at birth, losses which her doctor said may have been due to the stress of losing her home.

In response to the foreclosure and eviction, the Fykes filed a civil complaint, and later a first amended complaint (the operative complaint) against Janian, NHC, Otani, and others. The operative complaint alleged causes of action for legal malpractice, fraud, breach of contract, and violation of Civil Code section 2944.7.[4]

Trial of the action was initially calendared for June 2015, with a final status conference to occur approximately two weeks prior. By this time, all of the defendants, with the exception of Janian and various entities controlled by him, had defaulted.

The trial court's standing orders required parties to file trial-related documents (e.g., exhibit lists, witness lists, jury instructions, and a statement of the case) at least five court days in advance of the final status conference. The standing orders provided the failure to file the documents in advance of the final

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[4] In 2009, the same year that Janian set up his loan modification business, the Legislature enacted Civil Code section 2944.7 (added by Stats. 2009, ch. 630 § 10, eff. Oct. 11, 2009), which prohibits "any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance" from charging or collecting any advance fee. (Civ. Code, § 2944.7, subd. (a)(1); *In re Scheer* (9th Cir. 2016) 819 F.3d 1206, 1208.)

status conference "may result in the imposition of appropriate sanctions," including, among other things, the "exclusion of evidence (e.g. not being able to call witnesses, or present exhibits at trial)."

Neither Janian nor the Fykes filed proposed exhibit lists or witness lists in compliance with the trial court's standing order. The trial court found the noncompliance was "a waiver by the parties of [a] jury trial" and precluded the parties from introducing any exhibits at trial or "calling witnesses other than parties . . . ."

The court trial ultimately held was bifurcated into a liability phase and a punitive damages phase. Following a four-day bench trial on the liability issues, the trial court found in favor of the Fykes on all of their causes of action, including a cause of action for violation of the Unfair Competition Law that the Fykes were permitted to add to the operative complaint during trial.[5]

In rendering its verdict, the trial court stated it was "announc[ing] the following statement[ ] of decision, consistent with [Code of Civil Procedure] section 632, California Rules of Court[, rule] 3.1590" and directed the Fykes' attorney to prepare a proposed statement of decision consistent with the court's comments.[6] In an extended discussion on the record spanning 30

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[5] Although the trial court found that Janian and the other defendants violated Civil Code section 2944.7, it ultimately denied the Fykes any recovery for the violation after determining the statute did not confer a private right of action.

[6] No statement of decision is included in the 69-page appendix that Janian provided on appeal. Nor is a statement of

reporter's transcript pages, the court made credibility findings and explained the evidence and law on which its verdicts rested.

The court "found all four of the Fykes, every one of them, to be honest and credible. There was not even a doubt as to a hint of any issues with credibility as to any of the four members of the Fykes family." In contrast, the court found Janian's credibility to be "extraordinarily low." Among other things, the court pointed to the contrast between Janian's admissions that he referred clients to the New York lawyer (Frank) and that his relationship with Frank was such that he later credited Forrest, Sr. and Valerie part of their retainer fee due to the dismissal of the New York action, and Janian's assertion, on the other hand, that "he really didn't know Mr. Frank" or even "if there really was a person such as Mr. Frank."

With regard to Janian's chief line of defense during trial, i.e., that he should not be held liable because he had ostensibly withdrawn from participating in NHC before Forrest, Sr. and Valerie's first visit to NHC's offices, the trial court cataloged the evidence indicating the opposite: Janian did not tell his landlord he was closing his business and instead kept his name on the lease for NHC's offices; Janian did not take any steps to remove his work product or client information from any of the 50 networked computers at NHC's offices when he purportedly left the business; Janian did not remove his signature stamp from the office; Janian failed to produce any evidence that he notified any

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decision included in the appendix filed by the Fykes. It is therefore unclear from the appellate record whether a written statement of decision was signed and filed, as contemplated by the trial court.

of his clients or employees that he was winding up his law practice; and Janian did not produce any evidence that he complied with the State Bar's requirements for closing a law practice. In addition, the court found it "telling" that Janian did not take steps to safeguard any of his files after purportedly closing his business; instead, he did nothing to prevent all those files from being lost, which made it practically "impossible for a defrauded individual to prove their case against Mr. Janian."[7]

Based on its liability findings, the trial court awarded the Fykes $579,044 in general and special damages.

With the liability phase complete, trial of the Fykes' action paused to give the Fykes an opportunity to seek discovery of Janian's financial condition, which was relevant because the court announced its intention to award punitive damages.

When trial resumed, the court heard evidence concerning punitive damages over the course of two days. Janian had resisted discovery into his financial affairs, requiring the Fykes to file a motion to compel discovery, which was granted along

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[7] Pursuant to Evidence Code sections 412 and 413, the trial court drew adverse inferences from Janian's failure to produce documentary evidence regarding his representation of the Fykes. Evidence Code section 412 provides: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Evidence Code section 413 provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

with an award of sanctions. The Fykes, however, were able to obtain information via third party subpoenas and presented evidence regarding assets currently or formerly held by Janian—including a multi-million-dollar apartment building.

At the conclusion of the punitive damages phase, the trial court once again found Janian lacking in credibility: "The court notes that Mr. Janian's testimony was not only not credible and evasive, but the evasiveness was so pervasive that—the evasiveness was in response to more questions than it wasn't. By far the majority of Mr. Janian's responses to . . . seemingly innocuous questions [was] evasive and nonresponsive. It's clear to this court that Mr. Janian has been involved in comprehensive schemes to hide his assets, to obfuscate people looking for a considerable amount of time." Among other things, the court observed that when Janian was questioned about various trusts, he would testify that he "didn't know they existed; and then when presented a piece of paper, he remembered they existed, but he d[id]n't know anything about [them]; and then the next piece of paper showed he, in fact, is some kind of officer or director." The court also found it significant that Janian characterized $600,000 he received as loaned funds, but did not disclose the loans on his taxes or in a bankruptcy filing, could not produce any supporting loan agreements or promissory notes, and would not reveal the names of the putative lenders. Further, the "most significant," "most telling" statement by Janian in the court's view was his admission that he did not know how many of his clients, besides the Fykes, lost their homes. For the court, Janian's ignorance revealed a lack of remorse and responsibility—the losses suffered by Janian's clients, the court found, were "not important to him."

The court awarded the Fykes a total of $500,000 in punitive damages.

II. DISCUSSION

By failing to fairly present on appeal the evidence introduced during the six-day trial, Janian has waived his arguments that assert various aspects of the court's judgment are unsupported by substantial evidence. As to Janian's evidentiary arguments, i.e., that the trial court erred in precluding him from calling Otani as a witness and in finding professional malpractice without any expert testimony as to the applicable standard of care, the former is forfeited by the absence of an offer of proof in the trial court and the latter is meritless in light of Janian's obvious professional failures that required no expert to explain. Janian's argument that he owed no tort duty of care to Forrest, Jr. and Melissa raises a legal determination that should have been raised by demurrer or motion for summary judgment. But even considering the argument on the merits at this late stage, it is meritless because well-established law holds an attorney can owe a duty of care to a nonclient, the harm to Forrest, Jr. and Melissa was certainly foreseeable on these facts, and there are no other considerations that mitigate against recognizing a duty. For similar reasons, the trial court properly found Janian owed a fiduciary duty to Forrest, Jr. and Melissa.

A. Janian's Substantial-Evidence-Based Claims Are Waived

Janian argues there was a failure of proof at trial on nearly every cause of action. He asserts there was no "evidence at all" of damages that resulted from professional malpractice, breach of

contract, or breach of fiduciary duty (because, he says, there was no proof that the Fykes' voided lawsuit had merit); he asserts there was "[n]o [e]vidence" he breached the retainer agreement or that Forrest Jr. and Melissa were third-party beneficiaries of that agreement;[8] he asserts there was "no evidence" he made representations he knew to be false when made, which would support fraud liability; he asserts there was no evidence that would establish "some further violation of the obligation of trust, confidence, and/or loyalty to the client" necessary for liability for breach of fiduciary duty as distinguished from mere professional negligence; he asserts there was "no evidence" he had notice of the foreclosure sale date such that he could be responsible for emotional distress damages (and he claims the Fykes' testimony "is not such relevant evidence as a reasonable man might accept as adequate to support hundreds of thousands of dollars in emotional distress damages"); he asserts the punitive damages award should be reversed because there was "no evidence of Janian's financial condition at the time of trial"[9] and "absolutely no evidence of any intentional, false, or fraudulent conduct by Janian, nor of any malice or oppression"; and he asserts the liability finding under the Unfair Competition Law was improper

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[8] "'Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract,' which we [would] review under the substantial evidence standard." (*Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 891.)

[9] Janian's brief states that at the time of trial he "was an unemployed, non-practicing attorney whose only income was $800 monthly from Social Security."

because "there was no allegation or evidence that Janian had engaged in any business activity forbidden by law."

The facts and record citations Janian musters in his brief as support for these sufficiency of the evidence claims are meager (that is putting it charitably) and one-sided. The factual statement in Janian's opening brief describes undisputed facts at trial over two-and-one-half pages (i.e., the Fykes sought a loan modification, they visited NHC after receiving a solicitation letter, "a civil complaint was filed in the Los Angeles County Superior Court purportedly by Janian and Associates," the complaint was voided, and the Fykes sued Janian) and proceeds to summarize his own trial testimony over the next two pages. Janian then devotes a paragraph to listing the causes of action on which he was found liable and the damages awarded. That is the entirety of the factual summary, and nowhere in the opening brief is there any mention—much less a refutation—of the trial court's on-the-record statement of decision justifying its verdicts.

The skewed factual presentation in Janian's opening brief was not lost on the Fykes. In addition to describing evidence supporting the judgment that Janian ignored, the Fykes' respondents' brief emphasized Janian had "refer[red] to testimony out of context and ignore[d] the evidence presented at trial" such that this court could consider all of Janian's substantial-evidence-based contentions waived. On notice of the problem, Janian's reply did nothing to ameliorate his deficient factual presentation. To the contrary, he cited to the trial transcript only twice (in one footnote), continued to ignore the trial court's statement of evidence and reasons in support of its findings, and opted to repeat his unadorned assertions of "no

evidence" in connection with his sufficiency of the evidence contentions.

"'It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.'" (*Foreman & Clark Corporation v. Fallon* (1971) 3 Cal.3d 875, 881 (*Fallon*).) Janian's sufficiency of the evidence contentions, as already outlined, require him to demonstrate no substantial evidence supports the trial court's findings, and "[a] recitation of only [his own] evidence is not the 'demonstration' contemplated under [that] rule. [Citation.] Accordingly, if, as [Janian] here contend[s], 'some particular issue of fact is not sustained, [he is] required to set forth in [his] brief *all* the material evidence on the point and *not merely [his] own evidence*. Unless this is done the error assigned is deemed to be waived.'" (*Ibid*.)

The Courts of Appeal have enforced this well-known *Fallon* waiver rule when an appellant levels broad-brush attacks on the sufficiency of the evidence without a serious and fair effort to set forth the pertinent evidence and explain why it does not suffice. (See, e.g., *Shenouda v. Veterinary Medical Board* (2018) 27 Cal.App.5th 500, 514-515 [applying *Fallon* waiver rule and emphasizing in particular the appellant's failure to address the trial court's findings]; *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96-97 [arguments waived where "what facts are mentioned [by the appellant] are skewed in [his] favor"]; *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317.) That is precisely what Janian has done, and while we acknowledge the *Fallon* waiver rule is strong medicine, the circumstances here require it. The substantial-evidence-based contentions are waived.

B. Janian Did Not Preserve His Objection to the Exclusion of Otani As a Witness

During the liability phase, Janian attempted to call Otani as a witness. The Fykes objected because the limitation on evidence the trial court imposed for noncompliance with the court's final status conference standing order precluded the litigants from "calling witnesses other than parties and from introducing [any] exhibits."

Otani had been named as a defendant in the Fykes' operative complaint, but his default had been entered. Janian argued he should be permitted to call Otani, despite his default, because he was technically a "party." Janian, however, made no offer of proof regarding what Otani would say if permitted to testify. The trial court excluded Otani as a witness, explaining that pursuant to the final status conference order it earlier issued, "parties were allowed" to testify but Otani was "not here appearing as a party," i.e., "not . . . testifying on his own behalf as a party who[ ] is able to defend himself."

Now on appeal, Janian cannot complain about Otani's exclusion as a witness because he did not properly preserve his objection to the exclusion in the trial court: he made no offer of proof as to the nature of Otani's testimony. Such an offer is a prerequisite to asserting evidence exclusion error. (Evid. Code § 354, subd. (a) ["A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless . . . it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means"]; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65

Cal.App.4th 1422, 1433 ["[A]n appellant must make an offer of proof in the trial court in order to claim on appeal that evidence was wrongly excluded"].)

C. Expert Testimony Was Not Necessary to Prove Janian's Malpractice

Expert testimony is often necessary to establish an attorney's conduct fell below the applicable standard of care, but it is not necessary in those situations where the malpractice is readily apparent. (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1146 ["Where the attorney's performance is so clearly contrary to established standards that a trier of fact may find professional negligence without expert testimony, it is not required"] (*Day*); *Wright v. Williams* (1975) 47 Cal.App.3d 802, 810 ["While California law holds that expert testimony is admissible to establish the standard of care applicable to a lawyer in the performance of an engagement and whether he has performed to the standard [citation], it by no means clearly establishes the parameters of the necessity of expert testimony to the plaintiff's burden of proof. In some situations, at least, expert testimony is not required"].)

In *Wright* and another Court of Appeal case, *Wilkinson v. Rives* (1981) 116 Cal.App.3d 641, 647-648 (*Wilkinson*), expert testimony was found to be essential because the alleged malpractice was not obvious. (*Wright*, *supra*, at pp. 810-811 ["Where . . . the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met"]; *Wilkinson*, *supra*, at pp.

647-648 [expert testimony necessary to prove malpractice in the form of failure to include an optional affidavit in a declaration of homestead].) By contrast, in a case involving an attorney who advised his client to collect money for construction work and then stop working, in violation of a Penal Code provision, expert testimony was unnecessary. (*Goebel v. Lauderdale* (1989) 214 Cal.App.3d 1502, 1505, 1508-1509 [no expert testimony was required because the attorney's conduct "demonstrates a total failure to perform even the most perfunctory research"]; accord, *Day*, *supra*, 170 Cal.App.3d at pp. 1146-1147 [expert testimony was not required to sustain a finding of negligence where the attorney committed numerous "blatant" and "egregious" violations of professional ethical standards as prescribed by the Rules of Professional Conduct].)

The trial court found Janian's conduct, like that of the attorneys in *Day* and *Goebel*, did not require expert testimony to establish the conduct fell below the standard of care. That is right, because Janian's professional failings were egregious. There was substantial evidence at trial that, among other things, the Fykes had been able to keep current with their mortgage payments before receiving the NHC solicitation; Janian and others at NHC advised the Fykes to stop making payments—and even more significantly—to "ignore" notices of default and sale that would ensue from nonpayment; and Janian and others at NHC requested (unlawfully, per Civil Code section 2944.7) thousands of dollars in up-front payments. Compounding this malpractice, Janian also failed to take any of the steps he promised the Fykes he would take to ensure they would not lose their home: no lis pendens was recorded, no court appearance was made on the lawsuit fee waiver application, and no

communication about the status of the voided lawsuit was initiated. Moreover, because Janian did nothing to prevent all of his client files from being lost, there was no evidence at trial that Janian (or anyone at NHC) ever attempted to negotiate a loan modification with the Fykes' lender prior to the foreclosure sale. On these facts, the trial court did not need an expert to understand Janian's conduct fell beneath the standard of care required of an attorney. (*Day*, *supra*, 170 Cal.App.3d at p. 1147; see also Rules Prof. Conduct, rule 3-110(A) ["A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence"], rule 3-500 ["A member shall keep a client reasonably informed about significant developments relating to the employment or representation"].)

D. Janian Owed Tort and Fiduciary Duties to Forrest, Jr. and Melissa

Janian does not contest the trial court's finding that he owed tort and fiduciary duties to Forrest, Sr. and Valerie. Janian does assert, however, that he should not have been held liable to Forrest, *Jr.* and Melissa because they did not sign the retainer agreement and, as Janian sees it, he therefore owed no duty of care or fiduciary duty to them.

1. Tort duty

Whether a lawyer sued for professional negligence owes a duty of care to the plaintiff "is a question of law and depends on a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 342 (*Goodman*); *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316 [existence of duty of

care as an element of a negligence action is a question of law, which is subject to a de novo standard of review on appeal].) The same standard of review applies to whether a defendant owes a fiduciary duty to a plaintiff. (*Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425, 441 ["'Whether a fiduciary duty exists is generally a question of law,' while 'whether [a person] breached that duty . . . is a question of fact'"].)

Beginning with *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*), our Supreme Court has consistently rejected the notion that only those who are in strict privity with a legal professional may sue for malpractice. (*Id.* at pp. 650-651 [holding a notary owed a duty of care to the beneficiary under a failed will even in the absence of privity].) *Biakanja* held that whether a defendant is liable to a third person not in privity in a particular case "is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm. [Citations.]" (*Id.* at p. 650.)

Our Supreme Court has applied the *Biakanja* factors, in combination with consideration of whether liability would place an undue burden on the legal profession, to hold attorneys had duties of care to persons who did not sign a retainer agreement with the attorney in question. (See, e.g., *Lucas v. Hamm* (1961) 56 Cal.2d 583, 588, 591 [nonclient beneficiaries could sue an attorney whose negligent preparation of a will caused them to lose their testamentary rights because the attorney's engagement

was intended to benefit the beneficiaries] (*Lucas*); *Heyer v. Flaig* (1969) 70 Cal.2d 223, 228 [relying on *Biakanja* and *Lucas* to hold intended beneficiaries can recover in the absence of privity with the defendant attorney], disapproved on other grounds in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617 (*Heyer*).) As *Heyer* explains, "public policy requires that the attorney exercise his position of trust and superior knowledge responsibly so as not to affect adversely persons whose rights and interests are certain and foreseeable." (*Id.* at p. 229.)

In the wake of *Biakanja*, *Lucas*, and *Heyer*, the Courts of Appeal have reiterated that attorneys may be found to owe a duty of care to nonclients. For example, in *Meighan v. Shore* (1995) 34 Cal.App.4th 1025, an attorney failed to advise the client's wife of the existence of a loss of consortium claim arising out of the client's injuries, and the couple did not learn of the existence of the claim until after the statute of limitations had run. (*Id.* at pp. 1029-1030.) The court, applying the multifactor test under *Biakanja* and *Lucas*, concluded that the attorney owed the couple (a client and a nonclient) a duty to inform them "of the existence of their rights under the consortium tort." (*Id.* at p. 1044.) The Court of Appeal explained the "[i]mposition of a duty in this limited situation will not impose an undue burden on the profession. To the contrary, it will vindicate the reasonable expectations of persons who seek legal advice about their rights, the providing of which is the unique office of an attorney." (*Ibid.*)

In contrast, courts have found attorney defendants do not owe a duty to a nonclient where the relationship between the client and nonclient is tenuous, and where there is no clear intent by the client that the nonclient benefit from the attorney's representation of the client. For example, in *Goodman*, *supra*, 18

Cal.3d 335, the plaintiffs alleged they were damaged as a result of negligent advice given by the attorney to his clients concerning the issuance of stock. Plaintiffs purchased the stock from the clients and the sale was subsequently alleged to have violated certain securities laws, the result of which was that the stock purchased by plaintiffs was ultimately rendered valueless. (*Id*. at pp. 341-342.) The *Goodman* court rejected the negligence claim, concluding the attorney had no relationship with the plaintiffs from which a duty of care could properly arise. (*Id*. at pp. 343-344 [attorney advice was not communicated to the plaintiffs, advice was not given to enable the clients to satisfy any obligations to the plaintiffs, and the plaintiffs were not parties upon whom the clients intended to confer a benefit when defendant provided the advice].)

Applying the considerations identified in *Biakanja* and *Lucas* here, Janian owed a duty of care to Forrest, Jr. and Melissa. Unlike in *Goodman*, there was a relationship, and a strong familial one at that, between what we assume for argument's sake were the nonclient beneficiaries (Forrest, Jr. and Melissa) and the clients (Forrest, Sr. and Valerie). Moreover, it was undisputed Forrest, Sr. and Valerie bought the house for the benefit of Forrest, Jr. and Melissa, and the trial court found on substantial evidence that Janian was aware of this. In addition, it was entirely foreseeable the Fykes would lose the house through foreclosure if they stopped paying the mortgage; if, as Janian advised, they ignored the resulting notices of default and sale; and if nothing else was done on their behalf—which nothing was. Third, it is undeniable Forrest, Jr. and Melissa suffered an injury as a result of Janian's negligent representation. Fourth, as already discussed, there is a close causal connection between

Janian's negligence and the loss of the house through foreclosure. Fifth, the imposition of a duty under the circumstances before us would encourage the diligent, competent practice of law and the timely communication of vital information from lawyer to client. Finally, imposition of a duty in this situation would not impose an undue burden on the profession. To the contrary, it will vindicate the reasonable expectation of persons who seek legal advice about their rights.

In short, on the facts here, the law required Janian to exercise his position of trust and superior knowledge responsibly so as not to affect adversely Forrest, Jr. and Melissa, persons whose rights and interests were certain and foreseeable. Accordingly, we hold that Janian, as a lawyer, owed a duty of care to Forrest, Jr. and Melissa.

2. Fiduciary duty

The duty owed by a lawyer to a client "is a fiduciary one, binding the attorney to the most conscientious fidelity." (*Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1150.) The attorney's fiduciary duty is broad, even extending at times to "conduct with a nonclient which affects the relationship with a client." (*Id.* at p. 1151; see also *Johnson v. Superior Court* (1995) 38 Cal.App.4th 463, 470 [an attorney may owe a fiduciary duty to a nonclient, because when he/she "represents a fiduciary he[/she] accepts something of a proxy obligation to protect the rights of the beneficiary"].)

Thus in *Galardi v. State Bar* (1987) 43 Cal.3d 683, an attorney was disciplined for conduct in connection with two real estate transactions. The attorney contended no duty was owed

because there was no attorney-client relationship between himself and the joint venturers. Our Supreme Court rejected the contention, stating: "[I]t is well settled that an attorney may be disciplined for breach of a fiduciary duty owed to a nonclient. [Citation.]" (*Id*. at p. 691.)

Here, the evidence we have already recited, and that cited by the trial court, establishes Janian was aware his conduct with respect to the house Forrest, Sr. and Valerie owned, but in which Forrest, Jr. and Melissa lived, would directly affect the relationship between his clients and the nonclients. To take just one example, following the dismissal of the New York claims, Janian met with Forrest, Sr. and Forrest, Jr. to discuss what steps should be taken to obtain a loan modification and avoid the foreclosure sale of the house that Forrest, Sr. and Valerie purchased for Forrest, Jr. and Melissa. Under all the circumstances, Janian, as a lawyer, owed a fiduciary duty to Forrest, Jr. and Melissa.

DISPOSITION

The judgment is affirmed. The Fykes shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

RUBIN, P. J.

KIM, J.